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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Pan American World Airways, Inc. ("Pan Am") petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed an order of the United States District Court for the District of Nevada denying Pan Am's motion for a preliminary injunction against respondents' picketing and similar activities at the Nuclear Rocket Development Station ("NRDS"). Both courts agreed that such activities were enjoinable as violations of the Railway Labor Act ("RLA"), 45 U. S. C. §§ 151-188 (1958), if that Act were applicable. The sole ground of the decisions below

was that the Act is not applicable to Pan Am's employees at NRDS, in Nevada, and, hence, that the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115 (1958), barred injunctive relief. The Court of Appeals made its determination despite the contrary decisions of the National Mediation Board ("NMB") that both Pan Am, as a "carrier", and its employees employed at its space stations (including NRDS), as well as at its airline bases, are subject to the RLA.

The decision of the Court of Appeals, based on the premise that carrier employees not engaged in transportation activities are not subject to the RLA, has established an untenable dichotomy between Pan Am's thousands of employees at the Cape Kennedy ("Canaveral") space station, who have been held by the NMB, since 1956, and by the United States District Court for the District of Columbia to be subject to the RLA, and its NRDS employees engaged in substantially identical work, who are said by the NMB to be under the Act but by the court below, in a collateral proceeding, not to be. In so doing, the Court of Appeals has disregarded the function of the NMB in the administration of the RLA, and the decisions of this Court as to the weight to be given to administrative determinations. The uncertainty thus created as to the coverage of the Railway Labor Act can be resolved only by this Court.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 2a-15a) is not yet officially reported, but may be found in 54 L. R. R. M. 2487 (BNA). The opinion of the District Court (App. A, pp. 16a-22a) is unreported.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit (App. A, p. 1a) was entered on November 5, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1958). *E. I. Du Pont de Nemours Powder Co.* v. *Masland*, 244 U. S. 100 (1917); *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 408-409 (1916); *Forsyth* v. *Hammond*, 166 U. S. 506, 512-514 (1897).

Questions Presented

1. Whether a court, in denying a preliminary injunction against violations of the Railway Labor Act, on the sole ground that the Act does not apply to the employees in question, erred in so deciding in the face of the NMB's long-standing application of that Act to employees identically employed, and to the very employees involved in the matter before the court.

2. Whether the Railway Labor Act applies to employees of a carrier by air who, although not engaged in air transportation activities, perform work substantially identical to that done by the carrier's air transportation employees, and have a direct and common interest for labor relations purposes with such employees.[1]

Statute Involved

The pertinent portions of the Railway Labor Act, 48 Stat. 1185 (1934); 49 Stat. 1189 (1936); 45 U. S. C. §§ 151-188 (1958), are set forth in Appendix B, *infra*, pp. 44a-51a.

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[1]This petition does not present for review, nor would the Court upon review be required to consider, whether the activities of respondents against which the complaint is directed constitute enjoinable violations of the RLA. The Court of Appeals agreed with the District Court that, if the RLA were applicable, an injunction should issue. (App. A, p. 3a).

Statement of the Case

Pan American World Airways, Inc., a New York corporation, is a common carrier by air engaged in interstate and foreign commerce. (R. 7).[2] For approximately ten years, Pan Am has rendered technical and base maintenance services under contract with the United States Air Force at Cape Kennedy, Florida ("Canaveral"), and, for a shorter period, under contract with the United States Army at the Electronic Environmental Test Facility at Fort Huachuca, Arizona. (R. 7, 284-85).

Under contract with the United States Atomic Energy Commission ("AEC"), dated June 28, 1963, Pan Am performs substantially identical services at the Nuclear Rocket Development Station ("NRDS"), Jackass Flats, Nevada.[3] NRDS is the primary research and development test facility for the Nuclear Rocket Development Program, which is a joint program of the AEC and NASA, concerned with research and development, for space travel, of nuclear-powered engines and vehicle stages propelled by those engines. (R. 7, 209; App. C, p. 68a).

The Relationship Among Pan Am's NRDS, Canaveral and Airline Station Employees.

The support services performed by Pan Am's employees at NRDS and at Canaveral are, as the Court of Appeals found, "substantially identical." (App. A, p. 11a; App. C, pp. 54a, 60a, 63a; R. 284).[4] That work, moreover,

[2] References identified by "R", are to pages of the certified Transcript of Record (in two volumes).

[3] This station is administered by the Space Nuclear Propulsion Office—Nevada Extension, an office jointly created by the AEC and the National Aeronautics and Space Administration. ("NASA"). (R. 7; App. C, *infra*, p. 67a).

[4] Pan Am's approximately 6,000 Canaveral employees are responsible for the maintenance of all the facilities at that Air Force base. (App. A, p. 2a). The similar scope of Pan Am's work at NRDS as set forth in its contract with the AEC is described in Defendants' Exhibit A in the District Court. (R. 300-04).

is "identical with the work performed by other employees of the same craft at the regular established [airline] bases of [Pan Am]".[5]

Pan Am's employees at Canaveral, at NRDS and at Fort Huachuca work in the same job classifications and perform identical services in most respects as do those at its airline bases. They are all "employees of Pan Am in exactly the same sense and with exactly the same terms and conditions of employment as employees of other divisions of the company . . . . engaged in air transportation. . . . " (App. C, p. 55a). Employees are transferred from jobs at airline bases to jobs at Canaveral and at NRDS. (App. C, pp. 53a-54a; 65a). Labor relations matters affecting employees at any of the locations throughout the Pan Am system have application to similar employees employed at other locations. Matters of labor policy, affecting rules, rates of pay and other conditions of employment are applicable to employees throughout the system. They are formulated and coordinated at Pan Am's system headquarters in New York City. Questions of their interpretation and application continuously arise and are resolved, because of their system-wide implications, in accordance with system-wide policies. (App. A, pp. 29a, 31a, 38a; App. C, pp. 54a-55a, 65a-66a).

History of NMB Application of the RLA to Pan Am's Space Site Employees.

1. *Pan Am's Canaveral Employees.* In 1950, the NMB, acting under the RLA, certified the Transport Workers Union of America, AFL-CIO ("TWU") as the exclu-

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[5] Decision of the NMB, dated July 10, 1956, p. 4, (NMB File No. C-2202). (R. 226; App. A, p. 29a). The full text of that decision is set forth in Appendix A, at pp. 23a-31a. See also App. C, pp. 63a-65a.

sive collective bargaining representative for the craft or class of airline mechanics (including plant maintenance mechanics and ground service employees) employed by Pan Am anywhere throughout its system in the continental United States. (NMB Case No. R-2225) (R. 194-95). The system-wide boundaries of the group of employees certified as part of the single class or craft was consistent with the NMB's unvarying practice. (App. A, p. 38a; see also, *In the Matter of Representation of Employees of the KLM Royal Dutch Airlines*, NMB File No. C-2098 (1953), 3 Determination of Craft or Class of the National Mediation Board 1). Several years later, Pan Am commenced its operations at Canaveral.

On August 19, 1955, the International Association of Machinists ("IAM") filed with the National Labor Relations Board ("NLRB") a petition for election under the National Labor Relations Act, 29 U. S. C. §§ 151-187 (1958), in a proposed unit confined to some of Pan Am's Canaveral employees, including plant maintenance mechanics and ground service employees. The transcript of the record made at the NLRB hearing on that petition was, in accordance with inter-agency arrangements, transmitted to the NMB to enable it to make a determination on jurisdiction. On January 30, 1956, the NMB advised the NLRB that, in its opinion, Pan Am's employees at Canaveral were within the coverage of the RLA and that the NMB therefore had jurisdiction over questions affecting their selection of a collective bargaining representative. (App. A, p. 24a). Accordingly, the NLRB dismissed the IAM petition on February 17, 1956. *Pan American World Airways, Inc.*, 115 N. L. R. B. 493 (1956).

The IAM thereupon requested argument before the NMB on the question of RLA coverage of Pan Am's employees at Canaveral. After argument, the NMB, on

July 10, 1956, reaffirmed its opinion to the NLRB of January 30, 1956—that the purposes and the language of the RLA required that Pan Am and its employees at Canaveral be treated as carrier and employees under the Act. (NMB File No. C-2202). (App. A, pp. 23a-31a).

The IAM then applied to the NMB to sever from the previously certified system-wide "craft or class" of Pan Am's mechanics and ground service employees, those employed at Canaveral, and to consider them as a separate "craft or class". After a public hearing, the NMB, on November 9, 1956, dismissed the IAM application. (NMB File No. C-2505). It affirmed once again that the employees involved were subject to the RLA, that it had jurisdiction over the representation dispute, and held that the previously established system-wide "craft or class" of Pan Am's mechanics and ground service employees, of which the TWU had been designated the exclusive bargaining representative, included those at Canaveral as well as at other Pan Am stations. (App. A, pp. 32a-39a).

The IAM and some of the Canaveral employees brought suit in the United States District Court for the District of Columbia against Pan Am, the NMB and NLRB, for a declaration that the RLA was not applicable to, and that the NMB had no jurisdiction over, Pan Am's Canaveral employees.[6] On motion for summary judgment, the District Court, on June 17, 1957, rendered judgment for the defendants, holding that the RLA was applicable, and that "the asserted jurisdiction of the National Mediation Board is not only lawful but compulsive." *Biswanger* v. *Boyd*, Civil No. 4496-56, 32 CCH Labor Cases ¶ 70,840 (not officially reported).

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[6]The IAM withdrew from the action before decision and it was prosecuted by the individual plaintiffs. The TWU became a party by intervention.

As a consequence of the NMB's decision and its affirmance by the District Court, which was binding on it and TWU, Pan Am has continuously treated with TWU as the exclusive representative of Pan Am's employees, in the craft or class of mechanics, wherever employed throughout the United States. (App. C, p. 60a). Thus, Pan Am's airline and maintenance mechanics and its ground service employees, wherever employed in the United States, whether at airline stations, Canaveral, Fort Huachuca or NRDS, have been and are covered by a single system-wide agreement with TWU, providing rules, rates of pay and working conditions uniformly applicable to all such employees. (R. 9; App. C, pp. 54a-55a; 60a).

2. *Pan Am's NRDS Employees.* By petition dated July 11, 1963 (R. 235-36), local unions at Las Vegas, Nevada, affiliated with the Hotel and Restaurant Employees & Bartenders Union, International ("H&RE") (including respondent Culinary Workers Union, Local Union 226), sought certification under the National Labor Relations Act as the exclusive representative of a unit of employees including a small number of Pan Am's NRDS ground service employees, although they were apparently within the system-wide class or craft certified by the NMB, covered by Pan Am's system-wide agreement with TWU.[7] On July 22, 1963, TWU so informed the NMB. (R. 201).

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[7] The NRDS employeees of Pan Am whom the "Culinary Workers" sought to include within the proposed unit perform custodial services as do other ground service employees at Canaveral and the airline stations.

On December 5, 1963, after the decision and judgment of the Court of Appeals, the respondent Building & Construction Trades Council also filed a petition with the NLRB seeking certification as the representative of the greater number of other Pan Am employees at NRDS classified as mechanics and ground service employees and also apparently covered by the NMB's system-wide class or craft determination and Pan Am's corresponding contract with TWU.

The NMB immediately notified the NLRB and the H&RE of the TWU's advice and informed all parties that past precedent indicated that it had jurisdiction over Pan Am's NRDS employees but that it was "prepared to hold [a] prompt hearing on [the] question of its jurisdiction." (R. 202-03).

On July 29, 1963, the NMB informed Pan Am, TWU, the NLRB, and H&RE that it regarded the controversy as one calling for clarification of its 1950 certification of TWU (as the representative of the class or craft of mechanics), as "amplified relevantly" on November 9, 1956 (holding the 1950 certification applicable to Pan Am's employees at Canaveral), and announced that it would hold a hearing on the matter after notice to all interested parties. (R. 204). On July 30, 1963, Pan Am informed the NMB of picketing at NRDS, with severe consequences to the operations there carried on, and having an apparent purpose of forcing acceptance of the respondent Building & Construction Trades Council ("B&CTC") as the representative of certain of Pan Am's employees there. The NMB made the B&CTC a party to the proposed hearing. (R. 205).

Upon notice to all parties, the NMB held hearings at Las Vegas on August 20 and 21, 1963 on the question of its jurisdiction, under the RLA, over questions of representation affecting Pan Am's mechanics and ground service employees at NRDS.[8] On October 29, 1963, the NMB con-

[8]The parties who appeared and participated at the hearing before NMB Member Howard Gamser were: TWU, respondent B&CTC, and its affiliated local unions (all of which are respondents herein); respondent International Brotherhood of Teamsters, and its local union in Las Vegas; H&RE and respondent Culinary Workers Union, Local Union 226; the Building & Construction Trades Department of the AFL-CIO; and the Brotherhood of Railway and Steamship Clerks. In addition, in the words of the NMB, "Pan Am and the AEC "were permitted to participate to the extent of furnishing the Board with technical advice and guidance." (App. A, p. 41a).

cluded (NMB File No. C-3367) that Pan Am and its mechanics and ground service employees at NRDS "are respectively a carrier and employees within the meaning of the Railway Labor Act", and that the NMB has jurisdiction. (App. A, pp. 40a-43a). The NMB deferred consideration of the applicability of current certifications, or class or craft determinations, until raised by "proper application under the statute." (App. A, pp. 42a-43a).

Proceedings Below: Application For Injunction Against Respondents' Activities.

On July 31, 1963, after respondents began picketing at NRDS apparently to procure recognition as the bargaining representatives of Pan Am's NRDS mechanics and ground service employees and to affect their terms of employment, contrary to the procedures and provisions of the RLA governing representation (45 U. S. C. § 152 Ninth), and changes of employment terms (45 U. S. C. § 152 Seventh, § 156), Pan Am began this action to enjoin such violations of the RLA. (R. 12, 21; App. A, p. 22a). On that day, the United States District Court for the District of Nevada, after notice and argument, granted Pan Am's application for a temporary order restraining the picketing and other activities violating the Act, which then ceased. After hearing on August 2, 1963, the District Court denied Pan Am's motion for a preliminary injunction, upon the sole ground that the RLA does not apply to Pan Am employees at NRDS.[9] (App. A, p. 22a). The District Court, however, acknowledging the novelty and importance of the question, and the seriousness of the injury to the government's as well as to Pan Am's interest, were the picketing to be resumed,

[9]The court said that it would, otherwise, "readily enjoin picketing in this labor dispute, which appears essentially to be a jurisdictional dispute. . . ." (App. A, p. 22a).

continued the restraining order pending application by Pan Am to the United States Court of Appeals for the Ninth Circuit for an injunction pending appeal. (R. 319).

On August 15, 1963, the Court of Appeals, on Pan Am's application and after extensive argument before a bench consisting of Judges Hamlin, Koelsch and Browning, granted an order enjoining picketing and similar activities pending hearing and determination of the appeal. (R. 346-47). The appeal was argued on October 10, 1963 before Judges Hamlin, Browning and Madden. When, on October 29, 1963, the NMB decided that the RLA was applicable to Pan Am's employees at NRDS (App. A, pp. 40a-43a), that decision was called to the court's attention. On November 5, 1963, the Court of Appeals affirmed the District Court's denial of the preliminary injunction on the sole ground that the RLA is not applicable to Pan Am's NRDS employees and that the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115 (1958), deprived it of jurisdiction to grant the injunction.[10]

Reasons for Granting the Writ

1. In deciding who are "employees" under the Railway Labor Act, a question of paramount importance to the administration of that Act, the Court of Appeals, contrary to the applicable decisions of this Court, failed to give weight to prior decisions of the National Mediation Board, the body charged with the Act's administration.

Pan Am urged below that the decisions of the NMB rendered in the course of its administration of the RLA—that the purposes of the Act require that Pan Am and its

[10] On December 3, 1963, Pan Am applied for and obtained an order staying the mandate of the Court of Appeals and continuing in effect the injunction previously issued by that Court, pending the filing and disposition of this petition. (R. 397-400).

space site employees should not be excluded from RLA coverage—decisions under which Pan Am and the various unions with which it deals have continuously acted for the past seven years, should be given great weight. The Court of Appeals gave them no weight at all.

Judge Madden's opinion for the Court of Appeals quoted merely a fragment of the 1956 NMB determination which it said, "we confess with deference, does not seem persuasive to us" (App. A, p. 12a); and then incorrectly paraphrased what the Board had said:

> "In short, the NMB's stated view was that if an employee works for an airline as a pilot, a ground crew member, or a bench worker in the airline's shoe factory having no remotest relation to its business as an air carrier, he is governed by the . . . [RLA] . . . ." (App. A, p. 12a)

This was a distortion of the NMB's opinion. For it was not the NMB's "stated view" that a bench worker in a shoe factory hypothetically owned by Pan Am "having no remotest relation to its business as an air carrier" is subject to the RLA. The NMB had expressed no view respecting a hypothetical bench worker in a hypothetical shoe factory. The view the NMB had expressed in 1956 was in respect to Pan Am's mechanics and ground service employees at Canaveral, and in 1963, in respect to similar employees at NRDS, who, the NMB found, perform work substantially identical to work performed at Pan Am's airline stations. It was the NMB's view that such employees were, for purposes of the RLA, subject to that statute's provisions *because* there *was* a relation between those activities and Pan Am's air service. It defined that relationship as the common interests shared by Pan Am's space site and airline station employees because they perform the same kind of work for the same employer, under common policy directives of

the same corporate officials. It pointed to the danger, which its experience in the administration of the Act led it to believe was genuine and probable, that a dispute and strike involving the space site employees might spread to or be supported by airline station employees, with the consequent threat of disruption in Pan Am's air commerce.

In a footnote, Judge Madden said that the current NMB decision as to the NRDS employees did not persuade the court to change its opinion which had been written prior to receipt of that decision. (App. A, p. 15a).

In failing to give weight to the NMB decisions on so important a question in the administration of the Act, and in failing to respond to the reasons offered by the NMB for holding the view it had expressed (not the hypothetical view it had not), the Court of Appeals acted contrary to the clear and established doctrine of this Court that reasoned determinations as to the reach of a statute by an agency charged by Congress with its administration are entitled to the greatest weight. *E.g., United States* v. *Drum*, 368 U. S. 370 (1962); *NLRB* v. *E. C. Atkins & Co.*, 331 U. S. 398 (1947); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944); *Gray* v. *Powell*, 314 U. S. 402 (1941).

In *NLRB* v. *Hearst Publications, Inc., supra*, this Court reversed the Court of Appeals for the Ninth Circuit for having failed to accord suitable weight to a decision by the NLRB that certain workers were "employees" within the meaning of the National Labor Relations Act. Here, as there, the Court of Appeals failed to give weight to a similar decision by the National Mediation Board, of a similar question under the RLA, a cognate statute. Indifference to such an administrative determination is particularly inappropriate on an application for a preliminary injunction which does not present to the court the record from which that determination was distilled.

2. In holding, contrary to the NMB, that the RLA does not apply to non-transportation employees of an air carrier who do work substantially identical to that of the carrier's transportation employees with whom they share common interests, the Court of Appeals wrongly decided an important question of federal law which has not been, but should be, settled by this Court.

A. The NMB Decisions.

In 1956, the NMB was called upon to determine whether, to achieve the aim of Congress to avoid interruptions to air commerce, Pan Am's mechanics and ground service employees at Canaveral, who were not engaged in air transportation activities, should be excluded from the dispute-settling procedures of the RLA. It held that if the Congressional purpose were to be accomplished, they should not be. Its reasons were given in the course of a thoughtful opinion, based on its experience in administering the statute:

> "The kind of work the employees perform [at Canaveral] is identical with the work performed by other employees of the same craft at the regular established [airline] bases of [Pan Am]. The departmental organization of [Pan Am] at the Missile Base is similar to that in effect on the other divisions of [Pan Am] and the executive controls from headquarters are the same as on other divisions." (App. A, p. 29a).

In the NMB's view, the "principal question"[11] was:

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[11] Earlier in its opinion, the NMB had quite properly looked to the words of the statute as indicative of its coverage: "Is the employer a common carrier by air engaged in interstate commerce? Does the individual perform any work as an employee? If both answers are in the affirmative, the Board's jurisdiction is clear." (App. A, p. 28a). That statement follows the express words of 45 U. S. C. § 181 which makes applicable pertinent provisions of the RLA to air carriers and their employees. (See note 13, *infra*). But as the Board later made plain in its opinion, this initial test was

> "whether the employees at [Canaveral] are engaged in activity so remote from the activity of the employer, as a carrier by air, that it may reasonably be said that the purposes of the [RLA] will be achieved in the event such employees are excluded from the jurisdiction of the Act." (App. A, p. 30a).

In resolving that question against the exclusion of the employees from the Act's coverage the Board said, in part:

> "Suppose the position of the [IAM] is adopted and the employees at the Missile Base are held not to be under the [RLA]; and further suppose that sometime hereafter a labor dispute arises between such employees and [Pan Am], and a strike is threatened with attendant picket lines. If picket lines were then to be established, it is reasonable to suppose that the main offices and air bases would be picketed. What effect would such picketing have upon the function of [Pan Am] as a common carrier of persons or property?
>
> "It is the express purpose of the [RLA], to avoid any interruption to commerce or to the operation of any carrier engaged therein and to accomplish such purpose the Act provides a number of steps that may be required of the parties for the protection of the public. If these employees are deemed to be excluded from the Act, then in the face of a serious labor dispute, the [NMB] would not be in a position to proffer its mediatory services under Section 5 of the [RLA]; and if a labor dispute persisted and threatened to substantially interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service, then the [NMB] could not notify

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not the primary basis for its decision. Yet the Court of Appeals summarized the NMB decision as turning exclusively on that portion of its opinion (App. A, p. 12a), and did not discuss at all the substantial reasons given by the Board for its interpretation of the statute.

the President so that he might create an emergency board, as provided in Section 10 of the [RLA].

> In the light of the purposes of the [RLA] to insure to the public, to the employees and to employers a means of settling disputes of the employees as to who may represent them for collective bargaining purposes and to settle disputes . . . so as to avoid interruption to commerce, we must conclude that the relationship of employees performing the functions that are performed for [Pan Am] at [Canaveral] by its employees is not so tenuous and remote as to remove them from the jurisdiction of the [RLA]." (App. A, pp. 30a-31a).

Since Pan Am's employees at NRDS perform services "substantially identical" (App. A, p. 11a) to those rendered by its Canaveral employees, the 1956 NMB decision and its careful explication have equal relevance to NRDS.

Until the District Court in this case rendered its decision on August 2, 1963, the NMB's construction of "employee", as used in the Act, to cover carrier employees other than those directly engaged in transportation, had not been disturbed or in any respect challenged by any court or administrative agency. It was affirmed by the District Court for the District of Columbia, (*Biscaniger v. Boyd, supra*), accepted by the NLRB,[12] and by carrier and unions. And after the decision of the District Court herein, the NMB re-affirmed its earlier determination when, on October 29, 1963, it held that Pan Am's employees at NRDS are subject to the RLA, saying, in part:

> "The activities on which these employees of the carrier, who are based at the Nevada Test Site, are engaged have such a functional relationship to the

[12] The NLRB had at an early date deferred to the jurisdiction of the NMB. *Pan American World Airways, Inc.*, 115 N. L. R. B. 493 (1956).

over-all operations of this carrier that assertion of jurisdiction is mandated by the statute." (App. A, p. 42a).

B. The Court of Appeals' Grounds For Rejecting the NMB's Construction of the RLA Do Not Respond to the NMB's Reasons.

Starting with the express words of Section 181 of the RLA which extends the statute to *all* employees of an air carrier, but basing its decisions primarily upon what, in view of its experience under the Act, would best effectuate the statutory purposes, the NMB determined in its 1956 decisions and in its current decision as to Pan Am's NRDS employees that those purposes would be subverted were such employees to be excluded from the express coverage of the Act.[18] The Court of Appeals did not directly review this most recent decision of the NMB nor, of course, the earlier decisions of 1956. It has nevertheless disapproved their result, and on grounds not addressed to the Board's reasons set forth at length in its 1956 decisions (App. A, pp. 23a-39a). The court below excluded all non-transportation employees from the coverage of the RLA although, as the NMB has found, many such employees, by their relationship to transportation employees may affect the maintenance of transportation services. The grounds on which the court below relied do not support such a limited construction of employees subject to the Act:

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[18] 45 U. S. C. § 181 extends the coverage of the RLA, in broad terms, to "every" air carrier and "every . . . person who performs any work as an employee . . . of such carrier. . . ." 45 U. S. C. § 182 incorporates, in terms, the broad coverage of § 181 into the prior provisions of the RLA prescribing "duties, requirements, penalties, benefits, and privileges". Thus, contrary to the suggestion of the court below (App. A, pp. 4a-5a, 7a-8a) the scope of § 181 is not limited by § 151; rather, the definitions of § 151 are expanded to include the coverage of § 181.

1. *NRDS is not a shoe factory and its mechanics and ground service personnel are not shoemakers.* The opinion of the Court of Appeals, after stating that Pan Am's operations at NRDS had "nothing to do with transportation by air or by rail," says:

> "It would seem, then, that the same problem of interpretation and application of the pertinent statutes would be presented, if Pan American's management had acquired and were operating a shoe factory for profit." (App. A, p. 6a).

It goes on to say:

> "The purpose of the restrictive provisions of the Railway Labor Act is to keep transportation moving. If the Act has the effect of keeping employees in a shoe factory working against their will, it would seem that the effect of the Act is not coincident with its purpose." (App. A, p. 7a).

Whether application of the procedures of the RLA to nonexistent shoe factory employees in a nonexistent shoe factory could reasonably be said to be necessary to avoid interruption of air commerce is not an issue in this case and has never, so far as we know, been an issue before the NMB. The NRDS employees in this case are mechanics and ground service employees doing, in the main, the same work as Pan Am's other mechanics and ground service employees at its airline bases. In the administration of labor statutes, similarity of work and community of interest have been made the basis for many determinations by administrative bodies and courts.[14] There would seem to be no need, therefore, to belabor the plain impropriety of deciding a question of statutory construction such as is involved here by starting

[14] See, *e.g.*, *Walling* v. *Taycffort, Inc.*, 158 F. 2d 944 (2d Cir.), *cert. denied*, 331 U. S. 851 (1947); *Town & Country Shoes, Inc.*, 101 N. L. R. B. 290 (1952); *Republic Steel Corp.*, 91 N. L. R. B. 904 (1950).

with the assumption that shoemakers employed in shoe factories and mechanics employed at space installations are equivalent, and then, because of the apparent incongruity of applying the statute to "bench workers" who, by unstated premise, do not have common interest with the usual carrier employees, deciding that Congress could not have intended to apply it to mechanics, who do have such common interest.[15]

2. *ICC Section 151 determinations of the work of employees of rail carriers are not instructive as to who are employees of air carriers under Section 181 of the Act.* After noting that Pan Am had referred to a part of Section 151 of the RLA, the Court of Appeals, in support of the limited meaning it gave to "employee", called attention to that part which refers to orders of the Interstate Commerce Commission ("ICC") defining the work of employees of railroads. The opinion then says:

> "We suppose that the Interstate Commerce Commission did not have in effect any orders relating to employees in a shoe factory, even though the shoe factory happened to be owned by a railroad." (App. A, p. 7a).

That comment misconceives the meaning of Section 151, and its application to Section 181. The ICC itself has acknowledged that it is the NMB, not the ICC, which is

[15]The Court of Appeals, in the course of its opinion, said: "Pan American says, obviously correctly, that it is a carrier, hence the person who works in its shoe factory, or in its NRDS enterprise is an employee within the meaning of the RLA." (App. A, p. 7a). In fact, Pan Am has not argued in any of the courts below, and does not argue here, that if it owned a shoe factory, those employees would *ipso facto* be covered by the RLA. If the NMB, however, after hearings, found that such employees did the same work as transportation employees of Pan Am, that common labor policies applied, and that their labor disputes could result in the interruption of air commerce, presumably the NMB would take jurisdiction over them, under the RLA.

empowered by the RLA to determine who are employees under that Act; the ICC's orders only define the kind of work which those who are employees do. *Ore Dock Foremen and Laborers*, 246 I. C. C. 703 (1941). Thus, contrary to the suggestion of the court below, the reference of Section 151 to the ICC does not confine the coverage of the RLA, in the case of rail carriers, to transportation workers. The NMB, on the contrary, has ruled that employees of a railroad, doing work defined in ICC orders, at a ski-lodge, are employees under the RLA. *In the Matter of Representation of Employees of the Union Pac. R. Co. (Sun Valley Operations)*, NMB Case No. R-2111 (1950), 2 Determination of Craft or Class of the National Mediation Board 113. The work there involved included that of mechanics, carpenters, painters and maintenance men, classifications long-established on the railroads, just as the classifications of mechanics and ground service employees at NRDS have been long-established on the airlines.

The Court of Appeals singularly could not find any intent on the part of Congress

> "to lift the employees of our hypothetical shoe factory, or of our actual Nuclear Research [*sic*] Development Station, out of the legal area occupied by most other workmen in the country who do exactly the same work under exactly the same conditions and surroundings, and place them, for employment relations purposes, in the 'state within a state' occupied by railroad and air transportation workers. . . ." (App. A, p. 9a).

It is precisely because the actual NRDS workers, and not the hypothetical shoemakers, do "exactly the same work under exactly the same conditions and surroundings" as the other base maintenance employees of Pan Am at its other stations, and because a dispute affecting them might affect their brothers engaged in the same work at the airline stations, that the NMB thought they were included, for employment relations purposes, under the same statute.

3. *It is the application of the RLA which is involved in this case, not of the FLSA, as in Jackson v. Northwest Airlines.* The case which the Court of Appeals regarded "as directly in point" (App. A, p. 14a) is *Jackson v. Northwest Airlines, Inc.*, 70 F. Supp. 501 (D. Minn. 1947). That case, decided nine years before the NMB Canaveral decision and its affirmance on review,[16] was thought by the NMB and the District Court of the District of Columbia (*Biswanger v. Boyd, supra*) to be quite beside the point.

It did not involve our question—how far, in light of the purposes of the RLA, do the dispute-settling procedures of that statute reach—but the quite different question of how to confine the exemption from the overtime obligations of the Fair Labor Standards Act, ("FLSA"), 29 U. S. C. §§ 201-219 (1958), directed by that statute for employees covered by the RLA, so as to give the fullest play to the beneficent purposes of the FLSA.[17]

Jackson was an action for overtime compensation under the FLSA. The defendant airline argued, among other things, that its employees, engaged in a bomber modification project were, under a provision of the FLSA, [then 29 U. S. C. § 213(a)(4), later § 213(b)(3), as amended in 1949] exempted from its overtime provision as employees of an air carrier subject to the RLA. The District Court

[16]Since 1950, when the Court of Appeals for the Eighth Circuit partially affirmed the District Court, 185 F. 2d 74, and until the courts below relied upon it, *Jackson* had not been followed by any other reported decision. Views contrary to those expressed in *Jackson* had previously been suggested in a number of other decisions. *McComb v. Union Stock Yards & Transit Co.*, 168 F. 2d 375 (7th Cir. 1948); *Keele v. Union Pac. R. R.*, 78 F. Supp. 678, 683 (S. D. Cal. 1948); *Brittan v. Hudson & Manhattan R. R.*, 50 F. Supp. 37 (S. D. N. Y. 1943).

[17]Contrary to the statement of the opinion below (App. A, p. 13a), the RLA did not provide "for overtime for work above 48 hours"; exclusion of employees from the FLSA overtime provisions, on the ground that they were under the RLA, would therefore have meant no such coverage for them.

said that the exemption did not apply; the basis of its decision[18] was that:

> "Broadly and literally construed, the [exemption] provision may sustain the latter meaning, as defendant [airline] contends. But it is well settled that the exemption provisions of the Wage and Hour Act must be construed strictly, not broadly, and that its remedial provisions must be construed liberally, so that the [Wage and Hour] Act's words will accomplish the purpose at which the Act is aimed." 70 F. Supp., at 504. See also, 185 F. 2d 74, at 77.

It may have been proper to give a strict construction to the RLA exemption to the overtime provisions of the FLSA, at a time when there was no contrary determination of RLA coverage, in order to effectuate the "remedial provisions" of the FLSA, where the necessary consequence of not doing so would be to deprive the employees of all statutory protection in respect to overtime. But it cannot follow from that, as the court below thought it did, that the coverage of the RLA in this case is to be similarly confined. The objective here is not application of the remedial provisions of the FLSA, achievable only by a narrow construction of its exemption provision, but application of the remedial provisions of the RLA, which the NMB believes is required by that Act's avowed purpose and a plain reading of its words. The consequence of such application is not the deprivation of statutory protection but the substitution of one set of statutory procedures (RLA) for another (NLRA).[19]

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[18] *Jackson* was affirmed in part and reversed in part, *sub nom. Northwest Airlines, Inc.* v. *Jackson*, 185 F. 2d 74 (8th Cir. 1950). A petition for certiorari by the plaintiff—not the carrier—*solely* on the question of the applicability of the Portal-to-Portal Act of 1947 was denied. 342 U. S. 812 (1951).

[19] The only other decision relied upon by the Court of Appeals was *Northwest Airlines, Inc.*, 47 N. L. R. B. 498 (1943), in which the NLRB dismissed, for lack of jurisdiction, a certification petition

Effect of the Court of Appeals Decision.

The nature of Pan Am's labor relations with all its employees over the past seven years has been compelled by the consistent NMB decisions. Pan Am has, under the RLA, applied its system-wide contract with TWU (and other system contracts with other unions) to its NRDS employees as well as to its employees at Canaveral, Fort Huachuca, and its airline stations. The NMB's determination that the RLA is applicable to Pan Am's NRDS employees and that the Board has jurisdiction over them has not been directly reviewed by any court and must therefore be presumed to be in full force and effect. Accordingly, Pan Am is bound in law to continue to discharge its many statutory obligations under the RLA both for its NRDS and its airline station employees. See, *e.g.*, 45 U. S. C. §§ 152, 156-158, 160, 184. (App. B, pp. 45a-49a, 51a).

The Court of Appeals has not reviewed, but only disagreed with, the prior NMB decisions. That court believes that the National Labor Relations Act, not the Railway Labor Act, governs Pan Am's labor relations at NRDS, and presumably at other space sites. This Court should review the judgment below in order that the applicable law be finally and definitively determined, and the irreconcilable

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filed by the UAW for a unit of Northwest Airlines' bomber modification employees. The NLRB said that since the NMB had not declined to assume jurisdiction in the case, it (the NLRB) would not undertake to assert jurisdiction. 47 N. L. R. B., at 501-02. On rehearing, the NLRB adhered to its previous decision, 51 N. L. R. B. 1012 (1943), and said, as a further reason why it could not assert jurisdiction, that "the [airline's] project is so integrated with its carrier activities as to preclude a finding that the project is a separate and distinct enterprise." 51 N. L. R. B., at 1015. Significantly, the NMB here has found that "the activities [at NRDS] have such a functional relationship to the over-all operations of [Pan Am] that assertion of jurisdiction is mandated by the [RLA]." (App. A, p. 42a). And in 1950, the NMB said that "[the Canaveral project] is part and parcel of [Pan Am] . . . ." (App. A, p. 38a).

disparity between the court below and the NMB resolved. Indeed, there seems to be no other way in which this significant conflict can be determined, for, despite the decision of the court below that the RLA does not apply to a carrier's non-transportation employees,[20] the NMB has decided that it does, has asserted its jurisdiction over Pan Am's NRDS employees and, presumably, will continue to do so.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, New York
January 3, 1964

Respectfully submitted,

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[20] The question has significance to all carriers, rail and air. For example, the NMB has held that powerhouse employees, automotive mechanics, maintenance mechanics, carpenters, painters, upholsterers, and maintenance and engineering employees, all employed by the Union Pacific Railroad Co. at its ski-lodge operations at Sun Valley, Idaho, are employees within the scope of the RLA, and that the NMB has jurisdiction over representation disputes affecting them. *In the Matter of Representation of Employees of the Union Pac. R. Co. (Sun Valley Operations)*, NMB Case No. R-2111 (1950); 2 Determination of Craft or Class of the National Mediation Board 113. The record of that proceeding shows that those employees were not engaged in transportation, but were exclusively employed in and around the ski-lodge maintained by the railroad.